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No. 08-7

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SUPREME COURT U.S.

In the Supreme Court of the United States

ROCKY H. CAIN,

Petitioner,

v.

TRANSOCEAN OFFSHORE USA, INC., AND SEDCO FOREX CORP.

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

I.
CARUSO, THE MAIN CASE RELIED UPON BY DEFENDANT, IS DISTINGUISHABLE FROM THE PRESENT CASE

In its opposition, Transocean relies mainly on *Caruso v. Sterling Yacht and Shipbuilders,*[1] decided by the Eleventh Circuit prior to *Stewart,*[2] to demonstrate that there is no conflict between the Eleventh and the Fifth Circuits.

However, the facts in *Caruso* are completely distinguishable from the facts of the present case. The plaintiff in *Caruso* had been hired to work on an uncompleted vessel, which had not yet been tested for sea trials and was injured while quartered ashore in a hotel. Here, Cain was injured on a vessel, the CAJUN EXPRESS, which had been completed, undergone sea trial, and had been accepted by its owner, Transocean Offshore USA, Inc. The CAJUN EXPRESS was cabable of and used for transportation on navigable water.

II.
THE COMBINATION OF THE TWO DECISIONS OF THIS COURT, *TUCKER* AND *STEWART*, UPSET AND OVERRULE THE JURISPRUDENCE OF THE FIFTH CIRCUIT

In the decision below, the Fifth Circuit correctly

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[1] *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, 828 F.2d 14 (11th Cir. 1987), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[2] *Stewart v. Dutra Construction Co.*, 543 U.S. 481; 125 S. Ct. 1118; 160 L. Ed.2d 932 (2005).

stated that the language in *Stewart* is broad and significantly enlarges the types of unconventional and special purpose watercraft to be considered vessels (*i.e.* every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water). But it failed to specifically consider whether, after *Stewart,* an incomplete structure which is capable of and actually used for transportation in navigable water is or can be a "vessel in navigation." Instead it merely applied its own pre-*Stewart* jurisprudence to hold that the CAJUM EXPRESS was not a vessel.

However, this Court has already ruled on this issue in *Tucker v. Alexandroff*[3] in a manner which is consistent with the reasoning in *Stewart.*

In *Tucker,* defendant, Alexandroff, a Russian naval service conscript, was sent, along with an officer and other men, to take possession of and man the Variag, then under construction in Philadelphia. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched at the time Alexandroff deserted. When Alexandroff left without leave, the Variag was lying in the stream, still under construction, not yet having been accepted by the Russian government. After he deserted, Alexandroff was subsequently arrested upon the written request of the Russian vice-consul and was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian crusier Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia. The district

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[3] *Tucker v. Alexandroff,* 183 U.S. 424; 22 S. Ct. 195; 46 L.Ed.264; 1902 U.S. LEXIS 724 (1901).

court and court of appeals agreed that neither under the terms of treaty of 1832 with Russia nor pursuant to the principles of international comity could Alexandroff be delivered over to the master of the Variag as a deserter.

The ninth article of the 1832 treaty authorizes the arrest and surrender of "deserters from the ships of war and merchant vessel of their country." Thus, this Court had to decide whether the Variag was a ship.

As explained by Mr. Justice Gray in his dissenting opinion:

> Alexandroff entered the Russian Navy in 1896, at the age of seventeen, for the term of six years, and was an assistant physician. He was one of fifty-three members of the Russian Navy, sent out in passenger steamship (not a Russian) by the Russian Government, under command of an officer, for the purpose of becoming part of the crew of the cruiser Variag; and arrived in this country October 14, 1899. The ship was then on the stocks, and was launched in October or November, 1899, and made one trial trip. But in June, 1900, she was still in the custody of the contractors, had not been completed by them, or accepted by the Russian government, and a good many of the contractors' men were still working on her; and only about eighty per cent of her price had been paid. Alexandroff was never on the ship, never signed any paper as a member of her crew, and was never ordered on board of her, either as a seaman or as an assistant physician; but from October, 1899, to April, 1900, lived on shore, with the rest of the men who came with him, had his photograph taken with them, received equipment, support and wages from the Russian Government, and performed the duties required of him as an assistant physician. He left his

> associates, without leave, at Philadelphia on April 20, 1900, went to New York, and there took up his residence, and on May 24, 1900, made in court a primary declaration of his intention to become a citizen of the United States[4].

However, even if the Variag had not yet been accepted by the Russian Government, had made one trial trip only, and Alexandroff had never set foot upon the vessel, a majority of this Court had no choice but to find that the Variag was a vessel:

> At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a ship in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron – an ordinary piece of personal property – as distinctly a land structure and a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own

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[4] *Tucker v. Alexandroff*, 183 U.S. 424, at 453.

> name. [...] She is capable, too, of committing a tort and is responsible of damages therefor.
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> [...] So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either in rem against herself or personam against her owners, upon contracts or torts, while if, in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injuries another vessel, she is liable to a suit in rem for damages[5].

Reading *Stewart* in the light of *Tucker* permits no conclusion other than that a vessel in navigation is any watercraft practically capable of maritime transportation, from the moment it is launched and touches water until it is permanently withdrawn from the water. The CAJUN EXPRESS was launched and actually capable of maritime transportation. Certainly, it was capable of and used for transportation in a much more sophisticated capacity than the scow in *Stewart.*

These two decisions complement each other. Following the reasoning of these two cases, the CAJUN EXPRESS should have been found to be a vessel in navigation inasmuch as it was launched, had transported workers and equipment from Singapore to the Gulf of Mexico, and was in navigation in the Gulf of Mexico on the date of the accident.

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[5] *Tucker v. Alexandroff*, 183 U.S. 424, at 437-440.

II.
THE ELEVENTH CIRCUIT'S DECISION IN *BUNGE*, CITING *TUCKER*, IS CONSISTENT WITH *STEWART* AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT IN *CAIN*

In *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922-925 (11th Cir. 2001), the Eleventh Circuit rejected the use of a definition other than 1 U.S.C. § 3, just as this Court did in *Stewart*, and relied on *Tucker* in deciding that the watercraft in that case was a vessel:

> Although a pre-nexus case, the Supreme Court in *Tucker v. Alexandroff*, 183 U.S. 424, 438-39, 46 L. Ed. 264, 22 S. Ct. 195 (1901), addressed whether a vessel under construction may be subject to admiralty jurisdiction. In essence, the Court held that a vessel in its stocks could not be made liable in admiralty, either *in rem* or *in personam*. The Court did state, however, that "in the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." *Id.* at 438, 22 S. Ct. 195. Like the vessel in *Tucker*, Hull No. 40 was launched and floating in a navigable water way.

Each of these decisions, from this Court and from the Eleventh Circuit, conflicts directly with that of the Fifth Circuit in *Cain v. Transocean Offshore USA, Inc.*[6]

CONCLUSION

There is a square and direct conflict between the

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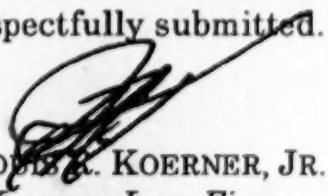
[6] *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295 (5th Cir. 2008).

Fifth and Eleventh Circuits regarding the vessel status of under construction but in navigation structures. In the present case, the CAJUN EXPRESS was not only in navigation, but finished, accepted by its owner, Transocean Offshore USA, Inc., had transported workers and equipment from Singapore to the Gulf of Mexico, and was in navigation in the Gulf of Mexico.

This Court's decisions in both *Tucker* and *Stewart* overruled the Fifth Circuit's prior jurisprudence regarding vessels still being constructed.

Finally, Cain should not be removed from Jones Act coverage while he was being exposed to the rigors and perils of the sea just because the newly-completed vessel capable of transportation on which he had been injured had not yet been accepted by the customer, Marathon Oil, as this is irrelevant.

Respectfully submitted.



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